

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,146

ARTHUR BRUCE,

Nathan J. Paulson
CLERK

Appellant,

474A

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Washington, D. C.
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STATEMENT OF QUESTIONS PRESENTED

The questions presented in this appeal from the District Court's denial, after hearing, of appellant's motion under 28 U.S.C. § 2255 and Rule 32(d), Federal Rules of Criminal Procedure, are:

I

Whether the judgment of conviction and sentence should be vacated and appellant allowed to withdraw his guilty plea, on the ground that he did not have the effective assistance of counsel, in that:

(1) he pleaded guilty on the basis of erroneous advice of counsel as to the acts constituting the offense of robbery; and

(2) he did not ask to withdraw his plea before sentencing on erroneous advice of counsel that he could later appeal.

II

Whether the judgment of conviction and sentence should be vacated and appellant allowed to withdraw his guilty plea in order "to correct manifest injustice" under Rule 32(d) of the Federal Rules of Criminal Procedure.

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Alexander v. United States, 290 F.2d 252, (5 Cir. 1961).	26,32
Anderson v. United States, 338 F.2d 618 (9 Cir.1964)	32
Carter v. United States, 113 U.S. App. D.C. 123, 306 F.2d 283 (1962).	35
Dayton v. United States, 115 U.S. App. D.C. 341, 319 F.2d 742 (1963).	20,31
*Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667 (1945)	23,26
Dodd v. United States, 321 F.2d 240, (9 Cir. 1963)	19
Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 857 (1945)	20,31
*Edwards v. United States, 103 U.S.App. D.C. 152.	20,22,23 26,27,32
Frاند v. United States, 301 F.2d 102 (10 Cir. 1962)	32
Jenkins v. United States, 101 U.S. App. D.C. 349, 249 F.2d 105 (1957).	19
Johnson v. United States, 329 F.2d 605 (5 Cir. 1964).	26,32
*Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937).	17
*Jones v. Huff, 80 U.S. App. D.C. 254, 152 F.2d 14 (1945)	19
*Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F.2d 787 (1958).	18,20,27
Moore v. United States, 101 U.S. App. D.C. 412, 249 F.2d 504 (1957)	20
*Pilkington v. United States, 315 F.2d 204, (4th Cir. (1963)).	34
*Poe v. United States, 233 F. Supp. 173 (D.C.D.C. 1964) affirmed U.S. App. D.C., 352 F.2d 639 (1965).	19,25
Popeko v. United States, 294 F.2d 169 (5 Cir. 1961)	27,29

TABLE OF AUTHORITIES

<u>CASES</u> (Continued)	<u>Page</u>
Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 77 L.Ed. 158 (1932).	18
Smith v. United States, 105 U.S. App. D.C. 115, 265, F. 2d 99 (1959)	26,32
Tomkins v. Missouri, 323 U.S. 485 65 S.Ct. 370, 89 L.Ed. 407 (1945).	18
United States v. Davis, 212 F.2d 264 (7 Cir. 1954).	35
United States v. Lester, 247 F.2d 496 (2 Cir. 1957)	35
United States v. McKinney, 122, F. Supp. 500 (D.C.D.C. 1954).	31
*United States v. Schneer, 194 F.2d 598 (3 Cir. 1952)	28,36
*Von Moltke v. Gillies, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948).	24
Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830 (1941).	17
Williams v. Kaiser, 323 U.S. 471, 65 S. Ct. 363, 89 L. Ed., 398 (1945).	18
Willis v. United States, 106 U.S. App. D.C. 211, 271 F. 2d 477 (1959)	32
Wilson v. United States, 286 F. 2d 197, (6 Cir. 1961)	26,32

CONSTITUTION

Amendment VI, U.S. Constitution

STATUTES

United States Code, Title 28, Section 2255
D.C. Code § 11-521.
D.C. Code § 22-502
D.C. Code § 22-2901

RULES

Rule 11, Federal Rules of Criminal Procedure
Rule 32(d) " " " "
Rule 35 " " " "

(Cases chiefly relied upon are marked by an asterisk*)

I N D E X

	<u>Page</u>
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
INDEX	iv
TITLE PAGE	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..	10
STATEMENT OF POINTS	12
SUMMARY OF ARGUMENT	13

ARGUMENT:

- I. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE AND TO PERMIT WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY, ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL.
 - A. Appellant Had A Constitutional Right to Effective Assistance Of Counsel In The Criminal Proceedings.
 - B. He Was Deprived Of This Right By Reason Of The Erroneous And Misleading Advice Of Counsel Prior To The Plea And Prior to Sentencing.
 - C. The Interrogation Of Appellant By The Trial Judge Did Not Cure This Constitutional Defect.
 - D. The Relief Requested In Appellant's § 2255 Motion Was Proper And Should Be Granted.

I N D E X

Page

- II. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE AND TO PERMIT WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY, IN ORDER "TO CORRECT MANIFEST INJUSTICE."
- A. Relief May Be Proper Under The "Manifest Injustice" Concept Of Rule 32(d), Federal Rules Of Criminal Procedure, Even Though No Constitutional Right Has Been Denied.
- B. Because Of Erroneous And Misleading Advice Of Counsel, Appellant's Plea Of Guilty Was Not Understandingly Made, And He Was Deprived Of The Right To Request Its Withdrawal Prior To Sentencing.
- C. Appellant's Motion, After Sentencing, To Withdraw His Plea Of Guilty Should Be Granted In Order "To Correct Manifest Injustice."

CONCLUSION 39

UNITED STATES COURT OF APPEALS
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No. 20,146

ARTHUR BRUCE,

Appellant.

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Arthur Bruce, was charged with two others in an indictment filed on February 24, 1965, with robbery in violation of D.C. Code § 22-2901 (count 1) and with assault with a dangerous weapon in violation of D.C. Code § 22-502 (count 2). On March 5, 1965, appellant pleaded not guilty to both counts, but on April 14, 1965, he withdrew his plea on the first count and pleaded guilty thereto. Judgment and sentence were entered on the first count on June 18, 1965, sentencing appellant to serve from two to eight years. The second count of the indictment, for assault with a dangerous weapon, was dismissed as to appellant and one of his codefendants. The

jurisdiction of the District Court was proper under D.C. Code § 11-521. The appellant has been and is presently in federal custody.

Appellant's motion to vacate judgment of conviction and sentence and to allow withdrawal of his plea of guilty on the ground of ineffective assistance of counsel was heard and denied on September 10, 1965, the order being filed on September 24, 1965. The jurisdiction of the District Court was proper under 28 U.S.C. § 2255 and Rule 32(d), Federal Rules of Criminal Procedure. This Court's jurisdiction is proper by virtue of 28 U.S.C. § 2255 and this Court's orders of December 3, 1965, and April 22, 1966.

STATEMENT OF THE CASE

Appellant, in Criminal Case No. 195-65, together with two others, was indicted by a Grand Jury on February 24, 1965, for robbery in violation of D.C. Code § 22-2901 (first count) and for assault with a dangerous weapon in violation of D.C. Code § 22-502 (second count). On March 5, 1965, he pleaded not guilty to both counts of the indictment. Subsequently, on April 14, 1965, upon advice of retained counsel, he withdrew his plea of not guilty on the first count and entered a plea of guilty thereto. On June 18, 1965, judgment of conviction was entered upon his plea of guilty to the first count, and appellant was sentenced to serve from two to eight years; the second count of the indictment was dismissed. No appeal was noted, nor was any motion made for reduction of sentence under Rule 35, Federal Rules of Criminal Procedure. Appellant has since been in federal custody serving this sentence.

In July 1965, appellant filed his motion to vacate sentence under 28 U.S.C. § 2255, which is the subject of the instant appeal. Counsel was appointed on July 30, 1965, by the District Court to represent appellant. A hearing was held on September 10, 1965, and appellant's motion was denied (order filed on September 24, 1965). Appellant's application for leave to appeal without prepayment of costs

was filed in the District Court on September 20, 1965, and was denied on October 4, 1965. A petition for leave to appeal without prepayment of costs was filed in this Court on October 11, 1965, and on December 3, 1965, was granted to the extent of allowing a portion of the transcript of testimony at the § 2255 hearing to be prepared at Government expense. On February 17, 1966, appellant's petition for leave to appeal without prepayment of costs was denied by a divided panel of this Court, but on April 22, 1966, the order of February 17 was vacated and the petition granted by the Court sitting en banc. On May 11, 1966, counsel appointed by the District Court was permitted to withdraw, and present counsel was appointed by this Court.

There are two transcripts involved in this appeal - the transcript of the § 2255 hearing held on September 10, 1965, and the transcript of the proceedings at the taking of the guilty plea on April 14, 1965. For the convenience of the Court, the transcript of the § 2255 hearing will be referred to as "(H.tr.)" and the transcript of the plea proceedings as "(P.tr.)". Throughout this brief, the counsel referred to is the counsel who represented appellant in the criminal case, and not counsel who was appointed to represent him on his § 2255 motion.

Retained counsel, who was serving without compen-

sation (H.tr. 10), testified at the § 2255 hearing concerning his conference with appellant which led the latter to change his plea from not guilty to guilty on the robbery count. According to his testimony, appellant appeared to be hazy in his recollections of what occurred before he and his codefendants entered the High store they were charged with robbing (H.tr. 6). Appellant said they had been drinking and he was highly intoxicated at the time (H.tr.3). There had been some discussion about "Let's go get some money," but there was no prior plan on how they were to get the money or to rob the store they entered. He told counsel that they entered the High store to get some cigarettes, that one codefendant pulled out a gun and began to shoot, while the other seized some money from the cash register. They then ran out of the store, at which point appellant himself hesitated for a moment and then panicked and ran with them. They went to the apartment of one of the trio, where they divided up the stolen money (H.tr. 5).

Counsel did not discuss with appellant the possibility that he might have been too intoxicated to form the specific intent required for robbery. He did, however, advise appellant that, if he had formed some vague kind of mischievous intent and was present when the robbery took place, ran with the two codefendants and later divided up

the stolen money with them, then he was equally guilty of robbery, even though he did not know that a robbery was to take place, and did not know that one of his companions had a gun which the latter intended to use (H.tr. 7-8). Counsel later on in his testimony reiterated that it was this concept of the acts constituting the crime of robbery which led him to recommend the guilty plea to appellant (H.tr. 10-11).

On April 14, 1965, before accepting the plea of guilty from Brodie (one of the codefendants) and appellant, the District Judge carefully interrogated them in accordance with Rule 11, Federal Rules of Criminal Procedure, to ascertain whether their pleas were voluntarily and understandingly made. Brodie, who was interrogated first, stated that he went into the High store with the intention of robbing it (P.tr. 4). When asked about the connection of appellant with this, Brodie stated: "Well, he was standing at the door, more or less a lookout, I guess" (P.tr. 5). Brodie's statements and his detailed description of the events were made in the presence of appellant.

The District Judge then interrogated appellant regarding his plea of guilty (P.tr. 8-14). Appellant stated that the trio went into the store to get some cigarettes, that he was as far as the door when the pistol went off, that

it was over in a minute, that he ran away with the other two and later divided the money with them (P.tr. 8-9).

In reply to questions by the Court, appellant stated several times that he did not go into the store to commit robbery but to buy cigarettes, that the first he knew of a robbery was when he heard the pistol go off (P.tr. 9-10). The following colloquy then took place between the Court and appellant (P.tr. 10-11):

THE COURT: Then why are you pleading guilty here?

THE DEFENDANT: Well, because I was there, Your Honor.

THE COURT: That doesn't make you guilty, because you happened to be there. Why are you pleading guilty?

THE DEFENDANT: And I got some of the money.

THE COURT: Well, you might be guilty of receiving stolen property, or something like that. From what you told me, you didn't know there was going to be a robbery, and that you went in there to buy some cigarettes; is that what you just said?

THE DEFENDANT: Yes, sir, that is what I said, as I got in the door, that is when --

THE COURT: I am talking about before you went in the door.

THE DEFENDANT: No, it wasn't planned way ahead, no sir.

THE COURT: You didn't know that anybody was going to shoot or rob anybody?

THE DEFENDANT: No, sir.

THE COURT: Did you hear Jackson say, let us take the store, or go into the store and rob somebody?

THE DEFENDANT: Well, as I said, I heard someone say it, sir, but, you know, I was just talking and drinking.

THE COURT: I will put the question to you once again. Now don't dilly dally with this Court, do you understand? Tell me the truth.

THE DEFENDANT: Yes, sir.

Thereupon, in response to repeated questions by the Court, the appellant answered affirmatively -- that he went into the store to rob it, that he had the intention of so doing, that he participated in the robbery, that he later shared money from a robbery he had thus participated in (P.tr. 11-13). Whereupon the Court accepted appellant's plea of guilty (P.tr. 14). Counsel testified at the \$ 2255 hearing that appellant had not told him all of the details developed during the plea proceedings, and that "I didn't know at that very moment whether the details he was telling me were details he was learning for the first time from Brodie and Jackson, or whether he honestly and sincerely remembered it because my information was at the time that Bruce told me that he was drunk." (H.tr. 27-28).

Counsel did not see appellant between April 14, 1965, and the day of sentencing, June 18, 1965. On the latter date, just before the sentence proceedings, counsel spent about 12-15 minutes with appellant in the cell block behind the courtroom (H.tr. 8, 15). During this brief interview,

appellant told counsel that he wished to withdraw his guilty plea (H.tr. 12-13). The remainder of counsel's testimony concerning this interview is rather confusing (H.tr. 12-17). The following facts, however, appear. Appellant expressed to counsel his desire to withdraw his previous plea of guilty, on the ground that he did not feel that he was guilty of robbery (H.tr. 9). Counsel, however, who still entertained an erroneous concept of the elements of the crime of robbery (H.tr. 10-11), was evidently successful in persuading appellant not to withdraw his plea. Appellant was clearly told that he could always appeal after the sentencing (H.tr. 12-13, 14-15). There is no indication that appellant was promised probation or a light sentence if he maintained his plea of guilty, but the record is replete with confusing and ambiguous statements on the matter of probation and possible sentence (H.tr. 12-14, 16-17). As a result of this brief interview, appellant did not pursue his expressed wish to ask leave to withdraw his plea of guilty. A few minutes later he was sentenced to serve from two to eight years.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, establishing the requirement of effective assistance of counsel, provides, in pertinent part:

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

The United States Code, Title 28, Section 2255, under which appellant seeks to have his conviction and sentence vacated (and under which the jurisdiction of both the District Court and this Court is proper), provides, in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

* * * * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

Rule 32(d), Federal Rules of Criminal Procedure, United States Code, Title 18, Appendix, upon which appellant also relies, provides:

A motion to withdraw a plea of guilty or of nolo

contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT OF POINTS

- I. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE AND TO PERMIT WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY, ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL.
 - A. Appellant Had A Constitutional Right To Effective Assistance Of Counsel In The Criminal Proceedings.
 - B. He Was Deprived Of This Right By Reason Of The Erroneous And Misleading Advice Of Counsel Prior To The Plea And Prior To Sentencing.
 - C. The Interrogation Of Appellant By The Trial Judge Did Not Cure This Constitutional Defect.
 - D. The Relief Requested In Appellant's § 2255 Motion Was Proper And Should Be Granted.
- II. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE AND TO PERMIT WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY, IN ORDER "TO CORRECT MANIFEST INJUSTICE."
 - A. Relief May Be Proper Under The "Manifest Injustice" Concept Of Rule 32(d), Federal Rules of Criminal Procedure, Even Though No Constitutional Right Has Been Denied.
 - B. Because Of Erroneous And Misleading Advice Of Counsel, Appellant's Plea Of Guilty Was Not Understandingly Made, And He Was Deprived Of The Right To Request Its Withdrawal Prior To Sentencing.
 - C. Appellant's Motion, After Sentencing, To Withdraw His Plea Of Guilty Should Be Granted In Order "To Correct Manifest Injustice."

SUMMARY OF ARGUMENT

I

The Sixth Amendment guarantees to a defendant in the federal courts the right to the assistance of counsel for his defense. Such assistance is needed by the defendant in determining whether or not to plead guilty. The right is to effective assistance of counsel, and the assistance rendered by counsel may be so ineffective as to constitute a denial of the constitutional right.

Counsel in this case advised appellant that he was guilty of robbery, as charged, if he was present when two of his companions decided to and did rob a store and he ran off with them and later received part of the money stolen by them. Counsel made no attempt to determine whether at the time appellant was so intoxicated as to negate the possibility of the required specific intent. On the basis of this advice, appellant pleaded guilty. Counsel further persuaded appellant not to withdraw his plea of guilty before sentencing, by assuring him that he could later appeal and by ambiguous statements as to the possibility of probation. On the basis of these facts, appellant did not have the effective assistance of counsel in making his plea or in failing to exercise his right to request its withdrawal before sentencing.

This constitutional defect was not clearly cured by the trial judge's interrogation of appellant before accepting the plea of guilty. Appellant repeatedly made statements which, if true, were inconsistent with a plea of guilty. It was only after he had been admonished not to "dilly dally with this Court" that he did make statements which, if true, would support a plea of guilty. While these latter statements may represent the true facts, it is equally possible that they were induced by the erroneous and misleading advice he had received from counsel, coupled with a sense of fear arising from the unfamiliar surroundings and the quoted admonition of the trial judge.

On the basis of the facts, appellant's § 2255 motion should have been granted, the judgment of conviction and sentence set aside, and leave given to withdraw the plea of guilty. This is not a case of unsupported allegations by appellant: the facts have been established by the testimony of his counsel. This Court is not here required to review the soundness of counsel's strategy in recommending a plea of guilty, or of his trial tactics or trial decisions. It is not a question of substituting hindsight for foresight: because of the erroneous and misleading advice of counsel as to the very elements of the

offense charged, appellant's plea of guilty was not understandingly made, and the proceedings became a farce and a mockery of justice.

II

Independently of the constitutional grounds urged above, the Court may set aside the judgment of conviction and sentence and allow appellant now to withdraw his plea of guilty in order "to correct manifest injustice" under Rule 32 (d) of the Federal Rules of Criminal Procedure.

Because of the erroneous advice of counsel, appellant's plea cannot be said to have been understandingly made. Because of that advice, he did not exercise his right to request withdrawal of the plea before sentencing. It is manifestly unjust to base a conviction upon a plea which has not been understandingly made, particularly when the same plea was not withdrawn by a timely motion because of further erroneous advice of counsel. On the basis of these facts, the trial judge should have granted appellant's motion under Rule 32 (d), after sentencing, to withdraw his plea.

ARGUMENT

- I. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE AND TO PERMIT WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY, ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant in this case contends that he was deprived of the effective assistance of counsel, guaranteed to him by the Sixth Amendment, when he was induced to plead guilty to a charge of robbery by the erroneous and misleading advice given to him by his retained counsel, and when he was also induced by the same kind of advice not to file a timely motion to withdraw his plea of guilty before sentencing.

The issue before this Court on appeal from denial of appellant's § 2255 motion is not whether appellant was guilty of the crime charged vel non. Nor is it for this Court to decide whether or not the statements made by appellant to his counsel or to the trial Court were true. The question before this Court is simply this: Was appellant deprived of his constitutional right to the effective assistance of counsel on the basis of the advice given him by his counsel?

- A. Appellant Had A Constitutional Right To Effective assistance Of Counsel In The Criminal Proceedings.

The Sixth Amendment to the Constitution of the United States guarantees that: "In all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defense." This Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel. Johnson v. Zerbst, 304 U.S. 458, 459, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937). If the accused is unable to hire a lawyer, appointed counsel must be provided for his defense in the federal courts. Walker v. Johnston, 312 U.S. 275, 286, 61 S.Ct. 574, 85 L.Ed. 830 (1941).

The right to counsel is important even where there is a plea of guilty, and such a plea does not of itself constitute a waiver of the right. As the Supreme Court has said of the waiver of the right to counsel, in Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed. 309 (1948), the right to the assistance of counsel:

. . . is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. . . . Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely

intelligent. . . .

And in Williams v. Kaiser, 323 U.S. 471, 475, 65 S.Ct. 363, 89 L.Ed. 398 (1945), the Court pointed out the need for counsel to determine the "instructions necessary to define the various elements of the crime." See also Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), Tomkins v. Missouri, 323 U.S. 485, 489, 65 S.Ct. 370, 89 L.Ed. 407 (1945).

The assistance to counsel which is guaranteed by the Sixth Amendment means effective assistance. As was pointed out by Judge Prettyman in Mitchell v. United States, 104 U.S.App.D.C. 57, 59-60, 259 F.2d 787 (1958), cert.denied, 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958), the adjective "effective" is not found in the Sixth Amendment. It came into the law in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), where it was used to describe a procedural requirement. It meant that counsel had to be appointed at such a stage of the proceedings and under such conditions that he would be able to give effective assistance. It is in this sense, as contrasted with a standard of skill on the part of counsel, that the term "effective assistance" has been used by the Supreme Court. See Mitchell v. United States, supra, at 60, and cases there cited.

Although the claim has usually been unsuccessful, the

federal courts nevertheless have recognized that the Sixth Amendment concept of "effective assistance" has a broader application, that counsel must actually give effective assistance, and that the assistance given by counsel may be so incompetent as to constitute a denial of the constitutional guarantee. Thus, in Jones v. Huff (arising on habeas corpus), 80 U.S.App.D.C. 254, 152 F.2d 14 (1945), this Court held that a hearing on the petition for a writ of habeas corpus should be held where it was alleged that counsel failed to object to a coerced confession, failed to subpoena known witnesses for the defense, failed to call a handwriting expert on a forgery charge, and failed to offer a sample of handwriting, although a juror had requested it. In Dodd v. United States, 321 F.2d 240, 245 (9 Cir. 1963), where counsel had failed to appeal from a judgment of conviction, the court remanded the case for a hearing on the ground that this was required for "the sound administration of criminal justice." In Jenkins v. United States, 101 U.S.App. D.C. 349, 249 F.2d 105 (1957), this Court remanded the case for a hearing on the charge of ineffective assistance of counsel. And in Poe v. United States, 233 F. Supp. 173, 178, (D.C.D.C. 1964), affirmed (on very narrow grounds), -- U.S. App.D.C. --, 352 F.2d 639 (1965), where counsel did not put on the stand the defendant, as his sole witness, because he erroneously thought that certain illegally obtained admis-

sions might be used to impeach his testimony, Judge Wright held:

The failure to inform petitioner of the applicable law deprived him of a fair trial. Where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the effective representation guaranteed him by the Constitution. . . .

The courts have applied a strict test to claims of incompetent representation by defense counsel, despite the frequent and eager urging of disappointed defendants. See Dorsey v. Gill, 80 U.S.App.D.C. 9, 28, 148 F. 2d 857 (1945), cert. denied, 325 U.S. 890, 65 S.Ct. 1580 89 L.Ed. 2003 (1945), Dayton v. United States, 115 U.S.App.D.C. 341, 342, 319 F.2d 742 (1963), cert. denied, 375 U.S. 947, 84 S.Ct. 357, 11 L. Ed.2d 277 (1963). But, even where relief has been denied, the courts have recognized that there is a right to competent representation and that incompetence of counsel may be so great as to amount to a denial of the constitutional guarantee. Mitchell v. United States, 104 U.S.App.D.C. 57, 63, 259 F.2d 787 (1958), cert. denied, 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958), Edwards v. United States, 103 U.S. App. D.C. 152, 153, 154 (1958), cert. denied, 358 U.S. 847, 79 S. Ct. 74, 3 L.Ed. 2d 82 (1958).

B. He Was Deprived Of This Right By Reason Of The Erroneous And Misleading Advice Of Counsel Prior To The Plea And Prior To Sentencing.

Defense counsel in the present case advised the appellant, in effect, as follows: If you were present in the High store when your two companions robbed it, if you ran away with them, if you received some of the stolen money -- then you are equally guilty of the crime of robbery, even though you went into the store to buy cigarettes and did not know a robbery was to take place until you heard the gun go off and saw one of your companions seize the money. On the basis of this understanding of the law applicable to the facts, counsel recommended that appellant plead guilty to the charge of robbery, and appellant in reliance changed his plea on that charge to guilty. (H.tr. 3-5, 7-8, 10-11). That this is clearly an erroneous understanding of the crime of robbery, as defined in D.C. Code § 22-2901, requires no citation of authorities. Although appellant told counsel that he was highly intoxicated at the time (H.tr. 3), and counsel recalled that appellant seemed hazy in his recollections of the event (H.tr. 6), counsel apparently made no effort to determine whether appellant may have been so intoxicated as to negate the specific intent required for the crime of robbery (H.tr. 7).

Later, in a brief conference just before sentencing, appellant stated to counsel his desire to withdraw his plea of guilty on the ground that he did not think he was guilty

of the crime of robbery (H.tr. 9). Counsel, still under his erroneous understanding of the elements of the crime of robbery, persuaded appellant not to withdraw his plea. As inducement for appellant to stick with his plea of guilty, counsel further advised him that he could always appeal the conviction (H.tr. 12, 13, 14, 15). Again, no citation of authorities is necessary to support the statement that this was clearly erroneous legal advice. Finally, while counsel never promised appellant that he would get probation or a light sentence if he maintained his plea of guilty, counsel did at this time make several ambiguous remarks about the possibility of probation or of a light sentence in such case (H.tr. 12-14). These remarks should be considered in conjunction with the erroneous legal advice as affecting appellant's ultimate decision not to withdraw his plea of guilty.

On the facts just recited, was appellant deprived of the effective assistance of counsel guaranteed by the Sixth Amendment? He here contends on the ground that, by reason of the erroneous advice of counsel on a question of law, his plea was not understandingly made nor understandingly maintained. In Edwards v. United States, 103 U.S. App.D.C. 152, 256 F.2d 707 (1958), cert. denied, 358 U.S. 847, 79 S.Ct. 74, 3 L.Ed. 2d 82 (1958), the appellant, like

appellant in the instant case, entered a plea of guilty and subsequently attacked his conviction on a § 2255 motion on the ground of ineffective assistance of counsel. Relief was denied, but Judge Burger, speaking for this Court, defined in some detail what the Court would consider ineffective assistance requiring relief on collateral attack. Citing Diggs v. Welch, 80 U.S.App.D.C. 5, 148 F. 2d 667 (1945), cert. denied, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945), he stated, Edwards v. United States, supra, at p. 153:

... Mere improvident strategy, bad tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel, unless taken as a whole the trial was a "mockery of justice." . . .

The Court then considered the claim that assistance of counsel was ineffective in a case where there was no trial but a plea of guilty was entered, Id., at pp. 154-155:

Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding.

There seems to be little doubt that the plea of guilty was in the present case voluntary. There is no allegation that appellant was induced to plea guilty by any conduct of the police, prosecutor or court, but only that his own counsel's "bad" advice induced him to plea guilty. This, however, does not itself make out involuntariness. It seems likewise clear that the plea was understandingly made. It may be argued that a plea of guilty is not understandingly made when defendant is unaware of certain

technical defenses which might very well make the prosecutor's job more difficult or even impossible were he put to his proof. However, we think "understandingly" refers merely to the meaning of the charge, and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto rather than to dilatory or evidentiary defenses. . . . Appellant does not try to say he did not do the act charged. He pleads only that, unknown to him, he might have been able to suppress the truth as to certain evidence of his crime, and thus, perhaps defeat justice. He cannot be heard to this end after a voluntary, knowing plea of guilty.

Appellant in the instant case earnestly urges upon this Court that, because of erroneous legal advice of counsel, his plea of guilty was not understandingly made within the meaning given to that term by this Court in the Edwards case. It is difficult to imagine a clearer example of the situation there described. Appellant here is not trying to avail himself at this late date of "dilatory or evidentiary defenses" overlooked by his counsel. Appellant here does say that he did not committ acts constituting the crime of robbery. The facts described by him to his counsel prior to changing his plea do not, if true, support a charge of robbery. Nonetheless, appellant was told by his counsel that these acts did make him guilty of that crime, and under this clear misapprehension he consented to plead guilty. The prejudicial nature of such advice, given by an F.B.I. agent to a defendant without counsel, was pointed out by the Supreme Court in Von Moltke v. Gillies, 332 U.S.

708, 722, 68 S.Ct. 316, 92 L.Ed. 309 (1948). It was expressed most clearly by the concurring opinion of Mr. Justice Frankfurter, Id., at p. 727:

The appropriate disposition of this case turns for me on the truth of petitioner's allegation that she was advised by an F.B.I. agent, active in the case, that one who merely associated, however innocently, with persons who were parties to a criminal conspiracy was equally guilty.

In the present case we are not left to conjecture upon the question of possible prejudice. The record clearly reflects the fact that similar advice was relied upon by appellant in entering his plea of guilty, and that such advice was not given by a stranger or a government agent, but by appellant's own counsel upon whom he had a right to rely for his defense. In Poe v. United States, supra, the failure of counsel, because of his ignorance of applicable law, to put defendant, his sole witness, on the stand was held to constitute ineffective assistance of counsel. In the instant case, counsel's erroneous advice as to the acts constituting the crime of robbery and defendant's plea of guilty in reliance thereon resulted, not merely in being deprived of his right to take the stand, as in Poe, but of his right to trial by jury and of his right to plead not guilty and to put the prosecution to its proof on the merits.

Where a plea of guilty has been advised by counsel

as a matter of strategy, the courts have refused, in a collateral attack upon the resulting conviction, to consider the soundness vel non of that strategy as bearing upon the question of effective assistance of counsel. Diggs v. Welch, supra, Moore v. United States, 101 U.S.App.D.C. 412, 413, 249 F.2d 504 (1957), Johnson v. United States, supra, Wilson v. United States, 286 F. 2d 197, 199 (6 Cir. 1961), cert. denied, 366 U.S. 921, 81 S.Ct. 1099, 6 L.Ed.2d 244 (1961), reh. denied, 366 U.S. 947, 81 S.Ct. 1676, 6 L.Ed.2d (1961), Alexander v. United States, 290 F.2d 252, 254 (5 Cir. 1961), cert. denied, 368 U.S. 891, 82 S.Ct. 144, 7 L.Ed.2d 89 (1961), Smith v. United States, 105 U.S.App.D.C. 115, 117, 265 F.2d 99 (1959), cert. denied, 361 U.S. 843, 80 S.Ct. 95, 4 L.Ed. 2d 81 (1959). The reason expressed has been the reluctance of the courts to determine what is, after all, basically a question of judgment on the part of counsel and to substitute hindsight for foresight. See Edwards v. United States, supra. In the present case, however, there is no indication in the record that counsel advised a plea of guilty as a matter of strategy, because he felt that the prosecution had too strong a case or because this might bring a lesser sentence. The record clearly indicates that his advice to plead guilty was based squarely upon his own erroneous concept of the crime of robbery.

The erroneous legal advice which led to the plea of guilty must be considered in conjunction with the erroneous legal advice which induced appellant not to withdraw his plea of guilty before sentencing. It may very well be that the advice before sentencing might not be sufficient, of itself, to warrant relief in this case, see Moore v. United States, supra. There is no question here of taking disparate and unrelated failures on the part of defense counsel, each of them insufficient in itself to sustain collateral attack, and "bundling" them together, see Mitchell v. United States, supra, at p. 59. Here the asserted deficiencies of defense counsel relate to one thing only -- the making of the guilty plea and the failure to withdraw it. In judging whether counsel rendered effective assistance in reference to the guilty plea, we must consider the proceedings as a whole. Edwards v. United States, supra, at p. 153.

There are cases suggesting that an accused is bound by all decisions of his retained counsel and that he is precluded from attacking his conviction on the ground that counsel of his own selection represented him inadequately. Thus, in Popeko v. United States, 294 F. 2d 168, 171 (5 Cir. 1961), cert. denied, 374 U.S. 835, 83 S.Ct. 1883, 10 L.Ed. 2d 1056 (1963), reh. denied, 375 U.S. 872, 84 S.Ct. 32, 11

L.Ed.2d102 (1963), the court said:

When a defendant selects his own counsel, the counsel truly represents the defendant, and no mistake or error of his, made in good faith and with an earnest and honest purpose to serve his client, can be made the basis of a claim of reversible error.

The case just cited, however, is concerned with the innumerable "trial decisions" which an attorney must make on behalf of his client in the course of a trial. It certainly does not apply to the situation where, as here, defense counsel has induced a plea of guilty by erroneous legal advice as to the very elements of the crime with which his client is charged. In such case, there is no reason for making any distinction between court-appointed counsel and retained counsel. Both are equally officers of the court, and the accused is entitled to rely upon their advice in this regard, as was recognized in United States v. Schneer, 194 F.2d 598, 600 (3 Cir. 1952), where the court said of retained counsel:

We agree with the defendant that the critical issue now is whether he changed his plea in reasonable reliance upon misrepresented information, limiting the issue to the fact that the misrepresentation, however innocent, was made by the defendant's counsel, an officer of the court

The attention of the Court is also directed to the fact that counsel for the accused in this case was serving without compensation (H.tr. 10). The nice distinction between

court-appointed and retained counsel, Popeko v. United States, supra, overlooks the stark realities of life. A poor man has very little choice as to the counsel he can get to represent him: he must take what he can get. In fact, he is fortunate if he is so poor as to be indigent and thus qualify for court-appointed counsel!

C. The Interrogation Of Appellant By The Trial Judge Did Not Cure This Constitutional Defect.

Appellant urges upon this Court that he has, on the basis of the law and the facts, amply sustained his burden of proving that he had ineffective assistance of counsel and was thus denied the guarantee of the Sixth Amendment. The question remains, however, whether this defect was cured by the interrogation to which the trial judge subjected appellant, before he accepted the plea of guilty, pursuant to Rule 11, Federal Rules of Criminal Procedure.

Counsel has been unable to find any case law directly in point. And unfortunately, on the basis of the facts in this case, this question can never be answered with certainty. It is clear from the record that appellant was persuaded to change his plea from not guilty to guilty on the basis of erroneous legal advice given by his counsel. (H.tr. 5, 7-8, 10-11). It is equally clear from the record that, on interrogation by the court, he repeatedly

made statements which were inconsistent with his proposed plea of guilty (P.tr. 8-11). His former counsel stated that appellant's original recollections of the events were hazy (H.tr. 6), and he suggested that appellant's later replies to the trial judge may have been influenced by the statements just made in his presence by his codefendant, Brodie (H.tr. 27-28; cf. P.tr. 3-5). Finally, it was not until after the trial judge had warned appellant not to "dilly dally with this Court" (P.tr. 11), that appellant began to answer affirmatively questions of the court which would tend to show that he actually participated in the crime. (P.tr. 11-13). The trial judge made every effort, as was his duty, to ascertain whether the plea of guilty was being voluntarily and understandingly made. In the ordinary situation those efforts would have been quite adequate. But the trial judge, of course, had no way of knowing that the accused had been erroneously instructed by his counsel as to the very elements of the crime with which he was charged. Appellant is a simple man and a stranger to the situation in which he found himself -- a defendant appearing before the court and charged with a serious crime. On the facts reflected in the record, we can only conjecture which of appellant's stories was true -- the story as he related it before he was admonished not to "dilly dally

with this Court" or the story as he related it under continued probing by the Court after that admonition. Even after the most careful consideration of the record, the answer to this question is subject to serious doubt. This doubt should be resolved against the Government. Appellant has sustained his burden of proving that he had the ineffective assistance of counsel: the Government should now be held to show that this deficiency was cured by the trial judge's interrogation of appellant in the concrete circumstances of this case. Cf. United States v. McKinney, 122 F.Supp. 500 (D.C.D.C. 1954), where Judge Holtzoff held that, although in a § 2255 motion the burden of proving that he did not have the assistance of counsel was upon the movant, yet, once this had been shown or conceded, the burden was upon the Government to show waiver of the right.

D. The Relief Requested In Appellant's
§ 2255 Motion Was Proper And Should
Be Granted.

The cases in which a § 2255 motion, based on a claim of ineffective assistance of counsel, has been denied can be generally grouped into two categories:

(1) Cases where the courts have found that there was no factual basis for the claim or that the claim was merely conclusionary in nature. See, v.g., Dorsey v. Gill, supra, and Dayton v. United States, supra.

(2) Cases where the facts allegedly misrepresented by counsel were equally available to the accused. See, v.g., Wilson v. United States, 286 F. 2d 197 (6 Cir. 1960), cert. denied, 366 U.S. 921, 81 S. Ct. 1099, 6 L.Ed. 2d 244 (1961), reh. denied, 366 U.S. 947, 81 S.Ct. 1676, 6 L.Ed.2d 855 (1961), Anderson v. United States, 338 F.2d 618 (9 Cir. 1964).

(3) Cases where the courts have refused to review or re-assess by hindsight counsel's judgment on questions of strategy, trial tactics or trial decisions. See, v.g., Edwards v. United States, 103 U.S.App.D.C. 152, 256 F.2d 707 (1958), cert. denied, 358 U.S. 847, 79 S.Ct. 74, 3 L. Ed.2d (1958), Smith v. United States, 105 U.S.App.D.C. 115, 265 F.2d 99 (1959), cert. denied, 361 U.S. 843, 80 S.Ct. 95, 4 L.Ed.2d 81 (1959), Willis v. United States, 106 U.S.App. D.C. 211, 271 F.2d 477 (1959), cert. denied, 362 U.S. 964, 80 S.Ct. 881, 4 L.Ed.2d 879 (1960), reh. denied, 363 U.S. 817, 80 S.Ct. 1250, 4 L.Ed.2d 1157 (1960), Alexander v. United States, 290 F.2d 252 (5 Cir. 1961), Frand v. United States, 301 F.2d 102, 103 (10 Cir. 1962).

The present case does not fall within any one of these three categories. The claim of ineffective assistance of counsel is not based on general allegations of appellant or on conclusionary statements: it is amply supported in the record by the testimony of the counsel concerned. Cf.

Johnson v. United States, 329 F.2d 605 (5 Cir. 1964), where defense counsel himself initiated the § 2255 motion. It is not based upon misrepresentations where the truth was equally available to the accused: here appellant relied, as he had a right to do, upon his counsel's advice as to the law applicable to the facts of his case. Nor are we concerned here with a post mortem review of the soundness of counsel's strategy, trial tactics or trial decisions: there is no question here of recommending a plea of guilty as sound strategy, but rather of recommending it simply because counsel misunderstood the applicable law. The policy reasons, therefore, which underlie the refusal of the courts to review questions of strategy or tactics or judgment are simply not present here. No Pandora's box will be opened if the Court here decides in favor of appellant. This case can be decided on the extremely narrow ground that appellant was denied the effective assistance of counsel when he relied to his prejudice on a completely erroneous instruction of counsel as to the applicable law. Cf. Poe v. United States, supra.

II. THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE CASE REMANDED WITH DIRECTIONS TO SET ASIDE THE JUDGMENT OF CONVICTION AND SENTENCE AND TO PERMIT WITHDRAWAL OF APPELLANT'S PLEA OF GUILTY, IN ORDER "TO CORRECT MANIFEST INJUSTICE."

Appellant's first argument was based on the ground that, under the circumstances of this case, he was denied the effective assistance of counsel, guaranteed by the Sixth Amendment. His second argument, asking for the same relief, is related to but independent of any constitutional ground. He asks that relief be granted under Rule 32(d), Federal Rules of Criminal Procedure, in order "to correct manifest injustice," even though the defects in the criminal proceedings against him may not have reached constitutional proportions.

A. Relief May Be Proper Under The "Manifest Injustice" Concept Of Rule 32(d), Federal Rules Of Criminal Procedure, Even Though No Constitutional Right Has Been Denied.

It has been held that the grounds for relief by withdrawal of a plea after sentencing are broader under Rule 32(d), Federal Rules of Criminal Procedure, than they are on a § 2255 motion based on constitutional concepts. Thus, in Pilkington v. United States, 315 F.2d 204, 209 (4 Cir. 1963), Judge Sobeloff stated for the court:

. . . While there may be a considerable overlap, the concept of "manifest injustice under Rule 32(d) permits the judge a greater latitude than the requirements of constitutional "due process." . . . The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done.

In that case, the accused pleaded guilty to a crime punishable by five years. It was not explained to him that, because of his age, he could be sentenced under the Youth Correction Act and receive a maximum of six years. See also Carter v. United States, 113 U.S.App.D.C. 123, 306 F.2d 283 (1962), United States v. Lester, 247 F.2d 496 (2 Cir. 1957).

- B. Because Of Erroneous And Misleading Advice Of Counsel, Appellant's Plea Of Guilty Was Not Understandingly Made, And He Was Deprived Of The Right To Request Its Withdrawal Prior To Sentencing.

The facts and the case law adduced by appellant under "B" and "C" of his first argument, supra, are applicable here and will not be repeated. The thrust of this branch of appellant's argument is that, under Rule 32 (d), a lesser degree of prejudice is necessary in order for him to qualify for relief than would be the case if he were asserting constitutional grounds for a § 2255 motion.

The record in the present case clearly shows that appellant was given erroneous advice on the elements of the crime, and that this may have been prejudicial despite the careful interrogation of appellant by the trial judge. Cf. United States v. Davis, 212 F.2d 264 (7 Cir. 1954), where the accused was charged with both substantive narcotics offenses and also conspiracy to commit those offenses. He

pleaded guilty in reliance upon the representations of his retained counsel that the indictment charged him with conspiracy rather than with substantive offenses. The court held that there must be a hearing on these allegations and that, if they were true, the plea must be withdrawn, even though the defendant was present in court and heard the lengthy discussion between court and prosecutor at the time the government moved to dismiss the conspiracy charged. And in United States v. Schneer, 194 F.2d 598 (3 Cir. 1952), the court remanded the case for a hearing whether Schneer should be allowed to withdraw his plea after sentencing on the ground that his retained counsel had misrepresented the possibility of a light sentence. The court there said, at p. 600:

We agree with the defendant that the critical issue now is whether he changed his plea in reasonable reliance upon misrepresented information, limiting the issue to the fact that the misrepresentation, however innocent, was made by the defendant's counsel, an officer of the Court. . . . The District Judge, at the time of the hearing also recognized the point stating that if he found that the defendant was misled, he would allow the withdrawal of the plea and the entry of a plea of not guilty.

And in United States v. Lester, 247 F.2d 496 (2 Cir. 1957), relief was granted. There Lester had moved to withdraw his plea before sentencing, and leave was denied. The court held that it should have been granted, and remanded for a

hearing on whether the accused could reasonably take ambiguous statements of the prosecutor as a promise inducing the plea.

C. Appellant's Motion, After Sentencing, To Withdraw His Plea Of Guilty Should Be Granted In Order "To Correct Manifest Injustice."

Even though the errors of counsel, set forth above, and the prejudice resulting therefrom to the appellant may not have reached constitutional proportions, they do cast into serious doubt the calibre of the proceedings by which appellant was convicted and sentenced. This doubt should be resolved by allowing appellant to withdraw his plea. The resolution of this doubt is not only important for the appellant: it has a direct bearing upon the integrity of federal criminal justice. And the federal courts, in their administration of criminal justice, must be like Caesar's wife -- above suspicion.

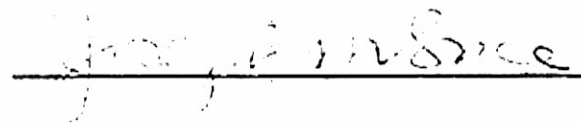
It should be noted here also that allowing appellant to withdraw his plea of guilty does not mean that he will go scot-free. The Government still has the power to try him on his original indictment or on some other offense, such as receiving stolen property. It does not mean that the Government will be put to the effort and the expense of another lengthy trial, for there has been no trial in this

case. It does mean, however, that the appellant will at at last have his "day in court," of which he has been deprived through the ineffective assistance of counsel.

CONCLUSION

WHEREFORE, appellant respectfully requests this Honorable Court to reverse the order of the District Court on the ground that appellant was deprived of the effective assistance of counsel or, in the alternative, that he should have been allowed to withdraw his plea under Rule 32(d) in order "to correct manifest injustice". Appellant further requests this Honorable Court to remand the case to the District Court with directions to set aside the judgment of conviction and sentence and to allow appellant to withdraw his plea of guilty.

Respectfully submitted,



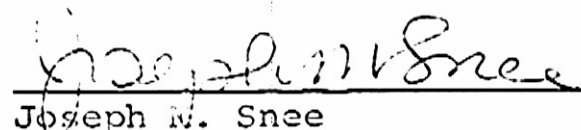
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Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of June, 1966, I did personally serve a copy of the above Brief for Appellant upon the Office of the United States Attorney for the District of Columbia, United States Court House, Washington, D. C.



Joseph M. Snee

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 14 1966

No. 20,146

Nathan J. Paulson
CLERK

ARTHUR BRUCE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Joseph M. Snee

Attorney for Appellant
(Appointed by this Court)

506 E Street, N.W.
Washington, D.C. 20001

Washington, D.C.
September 7, 1966

STATEMENT OF QUESTIONS PRESENTED

I.	
Erroneous Nature of Counsel's Advice	<u>PAGE</u> 1
II.	
The Necessity for Appellant to Take the Stand.	3
III.	
The Affidavits of Innocence.	4
IV.	
The "Clear and Erroneous" Test.	4

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
Pyles v. United States, _____ U.S. App. D.C. _____, 352 F.2d 639 (1965).	3
Smith v. United States, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963).	2
United States v. Poe, _____ U.S. App. D.C. _____, 352 F.2d 639 (1965)	4
Wright v. United States, 102 U.S. App. D.C. 36, 250 F.2d 4 (1957).	3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,146

ARTHUR BRUCE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The main points are appellant's argument in this case as set forth in his brief. There are, however, several questions raised in the appellee's brief which deserve further comment for the information of this court. This reference was dealt with briefly and informally.

I.

ERRONEOUS NATURE OF COUNSEL'S ADVICE

Whether appellant had the general intent to commit robbery is not sufficient. Such a general intent may indicate a depraved state of mind but it is never a crime.

It is horn book law that the crime of robbery requires a specific intent -- the intent to deprive its owners of specific property. Even if appellant had formed a general intent, together with his co-defendants somewhere and some time in the near future to commit the crime of robbery, he did not commit the crime of robbery at High's Store in question, unless he specifically intended to do so prior to the time the act was committed. Advice of counsel was, therefore, clearly erroneous. The case cited in this context in the government's brief (P. 10), Smith v. United States, 116 U.S. App. D.C. 404, 324 F. 2d 436, (1963) is irrelevant. The Court actually did not discuss the elements of the crime of robbery; no question was raised as to the presence vel non of a specific intent; the case was concerned exclusively with the admissibility of evidence under the Mallory Rule!

The advice of counsel that appellant could appeal after a plea of guilty was equally erroneous. It borders on the facetious to suggest that such a statement is upheld by the fact that the appellant might have at his disposal the limited scope of review afforded by the proceeding under § 2255 of Title 28 U.S.C. Clear indication is afforded by the difficulty which, as the records in this case reveal, the

appellant has had in bringing his case before this court.

II.

THE NECESSITY FOR APPELLANT TO TAKE THE STAND.

The question as suggested in its brief that the appellant in the § 2255 motion did not take the stand suggests that this was necessary in order for him to sustain his burden of proof that his confession was understandably made. The government in this context cites the case of Pyles v. United States, No. 19709, decided June 2, 1966 by this court, which in turn relied upon Wright v. United States, 102 U.S. App. D.C. 36, 250 F.2d 4 (1957), where it was stated that in general to sustain a plea of involuntariness of a confession it is generally necessary that the defendant take the stand. Both Wright and Pyles, however, were concerned with the voluntariness of extra-judicial confessions; the present case is concerned with whether his plea of guilty was understandably made. In Pyles the court commented that the defendant had not presented one scintilla of evidence on the question of voluntariness; in the present case the transcript of the 2255 hearing contains 35 pages of evidence, chiefly by appellants on counsel's erroneous advice, which read to the plea of guilty.

III.

THE AFFIDAVITS OF INNOCENCE

The government in its brief several times states that the appellant has never denied his guilt or asserted his innocence. (6, 9, 11). On the contrary, in his original "motion for arrest of judgment" filed with the District Court, July 1965, he stated his innocence to the charge under oath and on September 17, 1965, he filed with the District Court a formal affidavit of complete innocence to the charge to which he had pleaded guilty.

Further, his original statement to the trial judge at the plea proceedings were inconsistent with the plea of guilty -- and it may be noted that these statements, as well as the story he told to his counsel were the first version of his story and not the second as government suggests.

IV.

THE "CLEAR AND ERRONEOUS TEST"

Relying upon a phrase in United States v. Poe, U.S. App. D.C. 352 F.2d 639 (1965), the government suggests that the judgment of the court below should not be set aside unless it is found to be clearly erroneous. Appellant earnestly urges upon this court that it would be clearly erroneous to allow the conviction to stand on the circumstances under which it was ob-

tained and suggests grave and serious doubts raised in this unique case. Sound administration of federal criminal justice requires that in such circumstances the plea of guilty be withdrawn and the appellant be given his day in court.

CONCLUSION

Wherefore for the reason suggested here and in our main brief, appellant respectfully requests that this court reverse the judgment of the District Court and remand the case with directions to set aside the conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this ninth day of September, 1966, I did personally serve a copy of the above brief for Appellant upon the Office of the United States Attorney for the District of Columbia, United States Court House, Washington, D.C.

151 Joseph M. Snee

Joseph M. Snee

Paul K. Murphy

By: Paul K. Murphy

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,146

ARTHUR BRUCE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

RECEIVED
U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

FILED AUG 20 1965

DAVID G. BRESS,
United States Attorney.

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Assistant United States Attorneys.

C.A. No. 1854-65

QUESTION PRESENTED

Whether the files and records and the testimony received at a hearing of appellant's motions to vacate sentence and to withdraw plea of guilty, pursuant to 28 U.S.C. § 2255 and F. R. Crim. P. 32(d), showed that the district judge was "clearly wrong" in concluding that appellant had not been denied effective representation by counsel when he pleaded guilty?

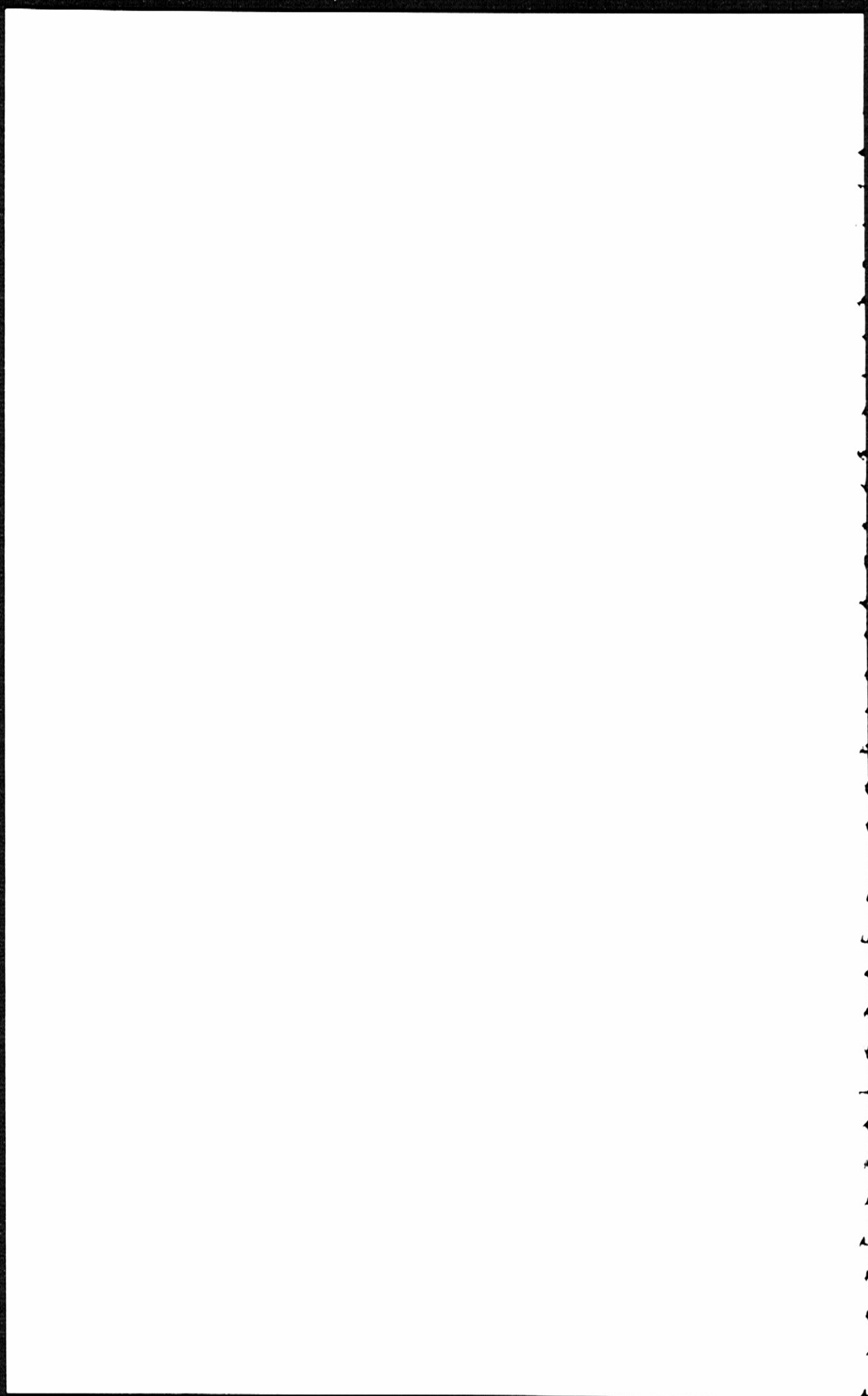
INDEX

	Page
Counterstatement of the case	1
Statutes and rule involved	7
Summary of argument	8
Argument:	
The testimony taken at a full hearing of appellant's motion, as well as the files and records of the case, show that the district court was not "clearly wrong" in concluding that appellant received effective assistance from counsel before pleading guilty	9
Conclusion	12

TABLE OF CASES

<i>Dayton v. United States</i> , 115 U.S. App. D.C. 341, 319 F.2d 742, cert. denied, 375 U.S. 947 (1963)	10
<i>Diggs v. Welch</i> , 80 U.S. App. D.C. 5, 148 F.2d 667, cert. denied, 325 U.S. 889 (1945)	10
* <i>Edwards v. United States</i> , 103 U.S. App. D.C. 152, 256 F.2d 707, cert. denied, 358 U.S. 847 (1958)	10
<i>Everett v. United States</i> , 119 U.S. App. D.C. 60, 336 F.2d 979 (1964)	2, 9, 11
<i>McCoy v. United States</i> , No. 19438, D.C. Cir., June 9, 1966 ..	11
* <i>Mitchell v. United States</i> , 104 U.S. App. D.C. 57, 259 F.2d 787 cert. denied, 358 U.S. 850 (1958)	10
<i>Pate v. United States</i> , 297 F.2d 166 (8d Cir.), cert. denied, 370 U.S. 928 (1962)	11
<i>People v. Chiricleison</i> , 3 N.Y. 2d 170, 143 N.E. 2d 914 (1957)	11
<i>Pyles v. United States</i> , No. 19709, D.C. Cir., June 2, 1966 ..	11
<i>Smith v. United States</i> , 117 U.S. App. D.C. 1, 324 F.2d 879 (1963), cert. denied, 377 U.S. 954 (1964)	10
<i>Smith v. United States</i> , 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), cert. denied, 376 U.S. 957 (1964)	10
<i>Smith v. United States</i> , 105 U.S. App. D.C. 115, 265 F.2d 99, cert. denied, 361 U.S. 843 (1959)	10
<i>United States v. Poe</i> , — U.S. App. D.C. —, 352 F.2d 639 (1965)	10, 12

* Cases chiefly relied upon are marked by asterisks.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,146

ARTHUR BRUCE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 24, 1965, the grand jury returned a two-count indictment charging appellant and two codefendants, Ronald L. Jackson and Nathaniel Brodie, with having held up a High's Ice Cream Store in violation of 22 D.C. Code § 2901 (robbery) and 22 D.C. Code § 502 (assault with a dangerous weapon). Each defendant pleaded guilty before the Honorable John J. Sirica, codefendant Jackson pleading to both counts on April 13, 1965, and codefendant Brodie and appellant pleading to the robbery

count alone the following morning. Before accepting each plea, Judge Sirica conducted a detailed and lengthy examination into whether the pleas were entered voluntarily and understandingly, in compliance with the "Resolution of the Judges of the United States District Court for the District of Columbia promulgated June 24, 1959"¹ (Jackson Plea Tr.; Bruce Plea Tr.)²

When Jackson pleaded guilty on April 13, he told Judge Sirica that on the morning of the robbery, appellant and Brodie, the latter with a pistol, came to his apartment, and they had some drinks. They left and, while riding around, decided that since Christmas was near, they needed some money. Seeing a High's Store that looked empty, they decided to rob it. They went inside and, with Jackson using the gun and shooting it once, held the store up. Later, all three split the proceeds (Jackson Plea Tr. 7-8).

The next morning, when Brodie and appellant appeared before Judge Sirica, Brodie pleaded first and told the judge the same story as Jackson. Brodie explained that he jumped over the counter and took the money, Jackson held the gun, and appellant was the lookout. (Bruce Plea Tr. 4-6).

Appellant followed Brodie to the bench. At first he told Judge Sirica that the robbery was unplanned, that they went into the store for cigarettes, that he did not know the robbery would take place until he heard Jackson shoot the gun, and that he was pleading guilty because he was present. When the judge told appellant that mere presence was not enough for guilt, appellant replied, "And I

¹ The complete text of the Resolution appears at *Everett v. United States*, 119 U.S. App. D.C. 60, 61-62 (n. 3), 336 F.2d 979, 980-981 (n. 3) (1964).

² There are four transcripts in the instant case. The transcript of Jackson's guilty plea on April 13 is referred to as "Jackson Plea Tr.;" the transcript of Brodie's and appellant's guilty pleas on April 14 as "Bruce Plea Tr.;" the transcript of sentencing as "Sent. Tr.;" and the transcript of the 2255 hearing below as "Hear. Tr."

got some of the money." The judge informed appellant that perhaps he was a receiver of stolen property but that he was not a robber because he was not aware that it would occur (Bruce Plea Tr. 8-10). Then the following occurred (Tr. 11-12):

THE COURT: You didn't know that anybody was going to shoot or rob anybody?

THE DEFENDANT: No, sir.

THE COURT: Did you hear Jackson say, let us take the store, or go into the store and rob anyone?

THE DEFENDANT: Well, as I said, I heard someone say it, sir, but, you know, I was talking and drinking.

THE COURT: I will put the question to you once again. Now don't you dilly dally with this Court, do you understand? Tell me the truth.

THE DEFENDANT: Yes, sir.

THE COURT: When you went in that store, did you know that you and the other two were going to rob somebody?

THE DEFENDANT: Yes, sir.

THE COURT: When did you make up your mind to rob anybody?

THE DEFENDANT: Right at the entrance of the store, sir.

* * * *

THE COURT: Well, did you go in to take part in the robbery?

THE DEFENDANT: Yes, sir.

THE COURT: You went in to rob the place?

THE DEFENDANT: Yes, sir.

* * * *

THE COURT: Now, as I understand it, you went in to take part in the robbery; is that correct/
[sic].

THE DEFENDANT: Yes, sir.

THE COURT: You are sure of that?

THE DEFENDANT: Yes, sir.

THE COURT: All right, don't come back some time and say, that I didn't know anything about this; do you understand?

THE DEFENDANT: Yes, sir.

Later, appellant said that when they split the proceeds, he knew that the money came from a robbery in which he had participated (Bruce Plea. Tr. 13). Finally, appellant told Judge Sirica that he had received no promises, and that he was pleading voluntarily because he was guilty (Bruce Plea Tr. 13-14).

On June 18, 1965, all three defendants appeared before Judge Sirica for sentencing. First, Jackson and, then, Brodie stepped up to the bar, and each received prison terms of four to twelve years. The judge explained at length that he was imposing severe sentences because a gun had been used and fired. (Sent. Tr. 1-17). Then, appellant stepped forward. Judge Sirica began by asking appellant if he wished to say anything, but appellant answered no (Sent. Tr. 19). Appellant's retained counsel followed with a plea for leniency, which covers six pages of the transcript (Sent. Tr. 19-24). Again, Judge Sirica asked appellant if he had anything to say, and again, appellant said no (Sent. Tr. 24). The judge then sentenced appellant to serve two to eight years in prison (Sent. Tr. 25).

Ten days after sentencing, on June 28, 1965, appellant signed an affidavit supporting a *pro se* motion to arrest judgment, which was filed in the district court on July 6. In the motion, appellant alleged that he "was advised at the last moment to change His [*sic*] plea to guilty of the original charge of robbery with the understanding that He [*sic*] would be given probation even though he wasent [*sic*] guilty of said charge but only a victim of circumstances. . ." (Motion, p. 2). Judge Sirica appointed new counsel, who filed a motion to vacate sentence under 28 U.S.C. § 2255 and to withdraw the plea of guilty under F. R. Crim. P. 32(d), alleging that appellant was innocent; that appellant's original counsel had erroneously ad-

vised him about the elements of the crime; and that before sentence was imposed, appellant told his attorney to withdraw the guilty plea and entered the sentencing proceedings believing that his plea would be withdrawn.

Judge Sirica ordered a hearing at which appellant was present and represented by counsel. Appellant's original counsel, Mr. Carl Fogel, testified that in their discussions appellant said that he was intoxicated and gave the same account of the facts as he later gave to Judge Sirica in the first instance, before he changed his account—namely, that appellant and his codefendants had been drinking and decided to “go get some money;” that the High's Store, “and the manner in which they would obtain the money, was not on their schedule, so to speak, if there were to be any misdoing;” that he went into the High's Store to obtain cigarettes, not knowing that Jackson would use the gun and commit the robbery; and that they ran to an apartment to divide the money and “he knew then that he had done wrong” (Hear. Tr. 3, 4-5). The first time appellant told the story to Mr. Fogel he omitted mentioning that the gun had been used and that “they had, if not this store, some other plans in mind of let us say a mischevious [*sic*] nature. . .” (Hear. Tr. 6). Those two facts Mr. Fogel learned from codefendants' counsel, whom he spoke with many times, but appellant candidly admitted them when called to his attention (Hear. Tr. 4, 6). Whether appellant had been too drunk to form the specific intent to rob was not discussed (Hear. Tr. 7). Appellant never admitted to Mr. Fogel the additional fact that he later admitted to Judge Sirica in open court—that he and the others had planned the robbery before entering the store (Hear. Tr. 27-28). With these facts, Mr. Fogel advised appellant that he was as guilty as his codefendants (Hear. Tr. 7). Mr. Fogel never promised probation or a light sentence, and in fact, advised appellant that he would probably not receive probation because they had used the gun (Hear. Tr. 13, 16-17).

Mr. Fogel further testified that he did not see appellant between the day of the plea and the day of the sentence,

although he did speak to the probation officer three or four times during that period (Hear. Tr. 8, 10, 32-33). Before sentencing, Mr. Fogel spent twelve or fifteen minutes with appellant (Hear. Tr. 15). Appellant said that he wanted to withdraw the plea because he did not think that he was guilty of robbery (Hear. Tr. 9). Mr. Fogel said that he would go into court and move to withdraw it, although in view of what appellant had told Judge Sirica in open court before entering the plea, the motion might be unsuccessful (Hear. Tr. 12). Appellant also said that a "jailhouse lawyer" had advised him that he had an appealable error (Hear. Tr. 12, 14). In Mr. Fogel's words (Hear. Tr. 15):

He asked me, Could [sic] he appeal, and I had to answer, You [sic] can appeal practically anything now, but that was as far as we discussed appeal.

* * *

How could I say that he could not appeal? Of course, he can appeal. His remedies are available as you can see now.

Mr. Fogel advised that if appellant believed that "entering the plea of guilty was wrong, he should withdraw it now;" or if he had grounds to appeal, "then the proper course to follow would be to see what the severity of the sentence was, and then see whether he desired to pursue an appeal, but he never discussed with [Mr. Fogel] the grounds for an appeal" (Hear. Tr. 14). As for withdrawing the plea, Mr. Fogel's advice was, "just tell the Judge now that you want to withdraw your plea . . ." (Hear. Tr. 12). Mr. Fogel told appellant that the proceeding to take place in the courtroom would be his sentencing, and there was no agreement that either Mr. Fogel, appellant, or both would move to withdraw the plea (Hear. Tr. 15-16).

Appellant chose not to testify at the hearing.

Judge Sirica, filing findings of facts and conclusions of law, denied the motion for relief.

STATUTES AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 28 U.S.C. § 2255 provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 32 of the Federal Rules of Criminal Procedure, provides in pertinent part:

(d) *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

SUMMARY OF ARGUMENT

Appellant admitted all elements of the crime, including knowledge, in open court to Judge Sirica before pleading guilty. He has never denied the truth of his admissions. The fact that he gave his attorney a different version of the facts, and received the allegedly erroneous advice that his second version of the facts constituted the crime of robbery, is not pertinent. In fact, counsel's advice was correct. The district court was not "clearly wrong" in concluding that appellant's plea of guilty was entered voluntarily and understandingly, and that he received effective assistance of counsel.

ARGUMENT

The testimony taken at a full hearing of appellant's motion, as well as the files and records of the case, show that the district court was not "clearly wrong" in concluding that appellant received effective assistance from counsel before pleading guilty.

(Bruce Plea Tr. 8-14; Hear. Tr. 2-34).

There is no merit to appellant's contention that he should be allowed to attack the sentences entered on his plea of guilty because he was denied effective assistance of counsel. As our Counterstatement shows (pp. 2-4, *supra*), when appellant appeared before Judge Sirica to enter his plea, although he first denied having known in advance that the robbery would occur, he quickly changed his story and freely admitted that he knew about it before having entered the store. In open court he admitted to Judge Sirica all the elements of the crime, including knowledge. Appellant chose not to testify at the hearing below and has never denied the truth of what he told Judge Sirica. In spite of this, appellant still claims a right to withdraw his guilty plea under the theory that, even though he fully admitted his guilt to Judge Sirica, he had not been so candid with his lawyer, to whom he had earlier told a different story in which he had not fully admitted the extent of his participation in the crime, and that his attorney erroneously advised him that this second, out-of-court version of the facts constituted the crime of robbery. With all due respect to the earnest and scholarly brief filed on behalf of appellant in this case, we think that appellant's theory is so manifestly in error as to be refuted by its very statement. Judge Sirica did not accept the guilty plea on the basis of the hypothetical facts appellant told to his attorney; he accepted it on the basis of appellant's complete admission of guilt in open court, the truth of which appellant has never denied. As this Court said recently:³

³ *Everett v. United States*, 119 U.S. App. D.C. 60, 65, 336 F.2d 979, 984 (1964).

A defendant who stands before a court freely admitting his attempted robbery does not remotely meet the standard of offering a "fair and just reason" for withdrawing his plea of guilty prior to sentence. He must give some reason other than a desire to have a trial the basic purpose of which is to determine the very facts the defendant has just volunteered to the court on the record and while attended by his own counsel.

In any event, this Court has repeatedly held that bad legal advice does not constitute ineffective assistance of counsel, which occurs only when counsel is "so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce . . ."⁴ Moreover, in this case, counsel's advice was correct, appellant told counsel that he and his partners went out "to get some money" but had not definitely decided in advance that the High's Store would be the place, that he was present and fled after the crime, and that he accepted his share of the proceeds knowing that he was involved. Counsel's estimate of the situation followed this Court's estimate of almost identical facts in a case holding that the accused was guilty of robbery.⁵ Appellant does not contend that the representation was ineffective because counsel did not advise him about the defense of intoxication, and there would be no merit to such a contention since appellant told Judge Sirica in open court that he *knew* a robbery

⁴ *Mitchell v. United States*, 104 U.S. App. D.C. 57, 63, 259 F.2d 787, 793, *cert. denied*, 358 U.S. 850 (1958); *accord*, *Smith v. United States*, 116 U.S. App. D.C. 404, 324 F.2d 436 (1963), *cert. denied*, 376 U.S. 957 (1964); *Dayton v. United States*, 115 U.S. App. D.C. 341, 319 F.2d 742, *cert. denied*, 375 U.S. 947 (1963); *Smith v. United States*, 105 U.S. App. D.C. 115, 265 F.2d 99, *cert. denied*, 361 U.S. 843 (1959); *Edwards v. United States*, 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied*, 358 U.S. 847 (1958); *Diggs v. Welch*, 80 U.S. App. D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889 (1945); see *United States v. Poe*, — U.S. App. D.C. —, 352 F.2d 639, 640 (1965) ("We do not suggest that Poe was deprived of effective representation.").

⁵ *Smith v. United States*, 117 U.S. App. D.C. 1, 5, 324 F.2d 879, 883 (1963), *cert. denied*, 377 U.S. 954 (1964).

would take place, thereby precluding any notion that he was too drunk to form specific intent to rob. Nor did counsel mislead appellant about withdrawing the plea; for it was settled before the sentencing proceedings that appellant himself would withdraw the plea if he so chose, appellant twice received the right of allocution before pronouncement of sentence and said nothing, counsel's advice about appellant's right to appeal from a guilty plea was not clearly erroneous,⁶ and it makes no difference whether appellant seeks to withdraw his plea under the post-sentencing or the more permissive pre-sentencing standards because he cannot meet either test.⁷

Nothing in the instant case suggests that the plea was entered involuntarily or without understanding. Appellant did not even testify at the hearing below.⁸ In accepting the plea, Judge Sirica could consider not only appellant's admission of guilt, but also the statements of his codefendants when they pleaded guilty and said that appellant participated in planning the robbery and acted as the lookout (Counterstatement, p. 2, *supra*).⁹ It can-

⁶ The extent to which specific issues survive a plea of guilty is not definitely settled. For example, compare *Pate v. United States*, 297 F.2d 166 (8d Cir.), *cert. denied*, 370 U.S. 928 (1962), holding in the alternative that speedy trial issue does not survive guilty plea, with *People v. Chirieleison*, 3 N.Y. 2d 170, 143 N.E. 2d 914 (1957), holding to the contrary. In any event, as counsel pointed out at the hearing (Hear. Tr. 15), it is plain that appellant has "appealed" his conviction in this very proceeding.

⁷ See *Everett v. United States*, *supra* note 3, and the accompanying text quoting language which this Court applied to an accused who sought to withdraw his plea before sentence.

⁸ As this Court observed recently, it is "generally necessary for [the accused] to take the stand" in order to sustain his burden of proving involuntariness. *Pyles v. United States*, No. 19709, D.C. Cir., June 2, 1966, slip opinion p. 6.

⁹ "While it would be improper for a court to accept [a guilty plea] unless satisfied there was *significant evidence that the accused was involved*, . . . the court is not required to insist that the accused concede the inevitability or correctness of a verdict of guilty were the case tried" (emphasis supplied). *McCoy v. United States*, No. 19438, D.C. Cir., June 9, 1966, slip opinion p. 5.

not be said that the court was "clearly wrong" in refusing to vacate sentence and allow appellant to withdraw his plea.¹⁰

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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FRANK Q. NEBEKER,
OSCAR ALTSHULER,
THEODORE WIESEMAN,
Assistant United States Attorneys.

¹⁰ The conclusion of the district court stands unless "clearly wrong." *United States v. Poe*, *supra* note 4, at 640.

